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IN THE SUPREME COURT OF THE UNITED STATES

NO. 195

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Petitioners,

VS.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Respondent.

BRIEF OF RESPONDENT, W. J. MILLER, STATE TAX COLLECTOR

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Respondent.

BRIEF OF RESPONDENT, W. J. MILLER, STATE TAX COLLECTOR

The petition for writ of certiorari in this case is filed by the Columbus & Greenville Railway Company, a Mississippi corporation, located wholly within the State of Mississippi, petitioning for a review by the Supreme Court of the United States of a decision of the Mississippi Supreme Court declaring a provision of a state statute affecting a local corporation only to be unconstitutional as violating the due process and equal protection laws of the 14th Amendment to the Federal Constitution. Having found that the state statute violated the 14th Amendment to the Federal Constitution, the supreme law, the state court was not required to pass upon the constitutionality of the law as affected by the state constitution.

Before proceeding further with our brief, we think it best at this time to call the attention of this Court to the in-

correct contention made by counsel for petitioners at page 20 of their brief, wherein it is alleged that the Mississippi Supreme Court decided that insofar as the Mississippi Constitution was concerned, the amendment was a valid law. The state Supreme Court did not discuss the validity under the Mississippi Constitution in its opinion.

We, however, call the Court's attention to Section 14 of the Mississippi Constitution:

> "No person shall be deprived of life, liberty, or property except by due process of law."

The "due process" clause of the Federal Constitution and the Mississippi Constitution have the same meaning in matters of this kind. *Rodge vs, Kelly, Tax Collector*, 88 Miss. 209, 40 So. 552; *Hyland, Sheriff, vs. Sharp*, 88 Miss. 567, 41 So. 264. *D'Aguilla vs. Anderson* 120 So. 434, 153 Miss. 549.

STATEMENT OF THE CASE

Under the laws of the State of Mississippi, that part of the state lying and situate in what is known as the Mississippi Delta, comprising all of the state subject to overflow from the waters of the Mississippi and its large tributaries, is required to build, repair and maintain at its own expense the levees located therein. The Delta is divided into two separate and distinct districts, the Mississippi Levee District and the Yazoo-Mississippi Delta Levee District. An attempt was made to divide the two districts in order that each may maintain the particular levees which protected the particular land situated in each district. We

are concerned in this case with the Mississippi Levee District only, comprising the southern half of the Delta.

The state at large pays no money towards the upkeep of the levees and the legislature of the State of Mississippi, except by special act, exercises no supervision over the levee districts. A separate and distinct system of taxation is used in each district to raise the money to build, repair and maintain the levees.

The Mississippi Levee District was incorporated as a political subdivision by an act of the Mississippi legislature, approved November 27th, 1865. Under the original act, the board of commissioners was authorized and empowered to levee a land tax of ten cents per annum on each and every acre of land in the district except school lands, to be designated as the acreage tax, and a uniform tax of one cent per annum on each and every pound of lint cotton raised and gathered in the district, to be designated as the cotton tax. The amount of the tax has been changed from time to time.

By an amendment approved February 21st, 1878, the commissioners were authorized to levy and assess, in addition to the acreage and cotton tax, an ad valorem tax of not more than five mills upon the assessed value of all property, real and personal, lying in the district.

By Chapter 7 of the Act of 1886, the commissioners were authorized and empowered to levy a mileage tax on the railroads in the district. It was about this time that the railroads entered the levee district. The Act of 1886 was

amended by Chapter 125 of the Laws of 1908 so as to read as follows:

"Amendment to law levying taxes on railroad companies for support of levee system.

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That Chapter VII of the Sheet Acts of 1886, be, and the same is hereby amended so as to read as follows:

"That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, towit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including sidetracks or switches, the sum of $200 per annum; upon each and every mile of narrow-gauge railroad or railroads of less width than standard gauge, not including sidetracks or switches, the sum of $50 per annum; upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $120 per annum; provided, that no railroad or branch railroad shall be subject to taxation under this Act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished."

The amended act of 1908 was again amended by Section 1, Chapter 282 of the Mississippi Laws of 1914.

The petitioner and its predecessors paid the taxes under the Act of 1914 without objection. In 1926, the law was again amended by Section 1, Chapter 259, Mississippi Laws of 1926. It is this section which is now before this Court. We quote in full Section 1, Chapter 259, Mississippi Laws of 1926:

> "That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, al-

though the whole of said railroad or branch may not be finished; *provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be* $50.00 *per annum.*" (Italics ours)

By omitting the part of the Act of 1926, which is shown in italics, we have the full text of the Act of 1914. It is the Amendment of 1926, shown in italics, that was declared unconstitutional by the Mississippi Supreme Court. The Mississippi Levee District is therefore maintained at the present time by four schemes or systems of taxation, to-wit:

(1) An acreage tax of two cents per acre on each and every acre of land in this district.

(2) A cotton tax on every pound of lint cotton raised and gathered in the levee district.

(3) An ad valorem tax upon all property in the district, real and personal.

(4) A mileage tax on railroads.

In 1890, the State of Mississippi adopted its present constitution, and said constitution provides as follows:

"Article 11. Levees.

"Section 227. A levee system shall be maintained in the state as provided in this article.

* * * *

"Section 236. The legislature shall impose for levee purposes, in addition to the levee taxes heretofore levied or authorized by law, a uniform tax of not less than two nor more than five cents an

acre per annum upon every acre of land now or hereafter embraced within the limits of either or both of said levee districts. The taxes so derived shall be paid into the treasury of the levee board of the district in which the land charged with the same is situated; and the legislature, by the act imposing said tax, shall authorize said levee boards to fix the annual rate of taxation per acre within the limits aforesaid, and thereby require said levee boards, whenever a reduction is made by them in their other taxes, to make a proportionate reduction in the acreage tax hereinbefore mentioned; but said acreage tax shall not be reduced below two cents an acre per annum; and all reductions in such taxation shall be uniform in each of said districts; but the rate of taxation need not be the same in both of them; and such specific taxes shall be assessed on the same assessment roll, and collected under the same penalties, as the ad valorem taxes for levee purposes, and shall be paid at the same time with the latter. And no levee board shall ever be permitted to buy lands when sold for taxes; but the state shall have a prior lien for the taxes due thereto. The legislature may provide for the discontinuance of the tax on cotton, but not in such manner as to affect outtsanding bonds based on it, and on the discontinuance of the tax on cotton, shall impose another tax in lieu thereof; but the legislature may repeal the acreage tax required to be levied hereby after the first day of January, A. D. 1895.

"Section 237. The legislature shall have full power to provide such system of taxation for said levee districts as it shall, from time to time, deem wise and proper.

> "Section 238. No property situated between the levee and the Mississippi river shall be taxed for levee purposes, nor shall damage be paid to any owner of land so situated because of its being left outside a levee."

The proviso or amendment of 1926 is so clearly contrary to the spirit and letter of both the Constitution of the United States and of the State of Mississippi that the State Tax Collector decided to ignore said proviso and demanded of the Columbus & Greenville Railway Company that it pay the tax on the same basis as the other railroads of the same class in the district.

The State Tax Collector charged that the provision contained in said Section 1, Chapter 259, Laws of 1926, that,

> "Provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be $50.00 per annum."

is unconstitutional because it violates the 14th Amendment to the Federal Constitution in that it denies to the other railroads in the district the equal protection of the law, and takes their property without due process of law, and that it violates the "due process" and "uniformity and equality clauses" of the Mississippi Constitution (Sec. 14, see page 2 of brief,) and Section 236, which requires that "All reductions in such taxation shall be uniform in each of said districts", (page 6), referring in the latter section to the levee districts. It was also contended by the State Tax Collector that the law failed to comply with the mandatory

provisions of Section 234 of the constitution, which requires that all revenue laws dealing with taxes in the levee district be published in a newspaper in said district. (See Appendix for full text of Sections 112 and 234.)

At the first trial, the Circuit Court of Montgomery County, Mississippi, sustained a demurrer to the declaration and the State Tax Collector appealed to the Supreme Court of the State. The Supreme Court reversed and remanded the case, and we quote the pertinent part of the opinion: (154 Miss. 314, 122 So. 366)

> "Smith, C. J. The defendant owns and oprates a railroad, 18.41 miles of which lie in the Mississippi levee district, and this suit is to recover from it the sum of $12,150.60, levee taxes alleged to be due by it for the years 1296 and 1927, and statutory damages thereon. A demurrer to the tax collector's declaration was sustained in the court below, and his suit dismissed.
>
> "Chapter 7, Laws of 1886, imposed a levee tax on railroads in the Mississippi levee district of $100 per annum on each mile of the main line thereof in the district. This statute was amended by chapter 282, Laws of 1914, so as to impose a tax of $350 per annum upon each mile of the main line of railroads in the district. By Chapter 259, Laws of 1926, the 1914 statute was amended by adding thereto the following: 'Provided, further, that the tax per mile per annum on the main line of any railroad company which does not own in excess of 25 miles of railroad in the Mississippi levee district shall be $50.00 per annum'.
>
> "The appellee paid $50 per mile on its 18.41 miles of railroad in the district for the years

1926-1927, and this suit is to recover the difference between that amount and $350.00 per mile and damages thereon. The appellant's contentions are: That chapter 259, Laws of 1926, is void, and that consequently chapter 282 of the Laws of 1914 remains in full force and effect; but, if mistaken in this, that the proviso in chapter 259, Laws of 1926, is void.

"(1) Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads having not more than 25 miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same; that is, $350 per annum on each mile of its railroad in the levee district."

On the second trial, the Circuit Court rendered judgment against the Columbus & Greenville Railway Company on the basis of $350.00 per mile. From this decision the railroad appealed and the Supreme Court affirmed the decision in the Circuit Court and rendered the following opinion:

"Smith, C. J. This case is ruled by the opinion rendered on the former appeal herein (154 Miss. 317, 122 So. 366), to which we adhere; and the evidence excluded, if competent, as to which we express no opinion, could not have changed the result.

"Affirmed."

It is from this latter decision that the petition for writ of certiorari is filed.

ARGUMENT

LEVEE TAXES A BENEFIT TAX.

The purpose of the act as recited in the preamble thereof is as follows:

> "That for the purpose of contributing to the expenses of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit:"

Section 238 of the Mississippi Constitution provides that:

> "No property situated between the levee and the Mississippi river shall be taxed for levee purposes* * * * *";

It being the intention and purpose that only property receiving any benefits from the levees shall be taxed for their maintenance.

It follows, therefore, that all taxation for said district must necessarily be based upon and governed by the standard of benefit, and all classification shall be based upon and bear a reasonable and just relationship in respect to such benefit.

Adams vs. Standard Oil Company, 97 Miss. 879, 53 So. 692.

Chi. & St. Paul Railway Co. vs. Westby, 178 Fed. 619.

Southern Ry. Co. vs. Green, 216 U. S. 400, 30 Sup. Ct. 287.

Magoun vs. Bank, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. ed 1037.

Milken vs. Moffat Tunnel Imp. Dist., 262 S. 710, 43 Sup. Ct. 204.

Myles Salt Co. vs. Iberia, etc., 239 U. S. 478, 60 L. ed. 392.

Gulf C. & S. F. R. R. Co. vs. Ellis, 165 U. S. 150, 17 Sup. Ct. 25, 41 L. ed. 666.

Voight vs. Detroit, 184 U. S. 115, 22 Sup. Ct. 337; 46 L. ed. 459.

The General Rule As To Classification

The classification of property for taxes must have some basis, reasonable or unreasonable, other than mere accident,

whim or caprice. There must be some support of taste, policy, difference of situation or the like, or some reason for it, even if it is a poor one. If the classification results in an arbitrary and oppressive discrimination in regard to a class of citizens or a species of property, it contravenes the equal protection guaranty of the Federal Constitution. Such classification should treat all in the same class alike, and should not impose a heavier burden upon one than upon another of the same class, size, situation and value. The classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

Cotting vs. Godard, 183 U. S. 79, 46 L. ed. 92.

Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 48 Sup. Ct. 423, 72 L. ed. 770.

Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431.

People vs. Mensching, 187 N. Y. 8, 10 Ann. Cas. 101.

Fiscal Court vs. F. & A. Cox Co. (*Ky*), 117 S. W. 296, 21 L. R. A. (N. S.) 83.

A. & P. Tea Co. vs. Doughton, 144 S. E. 701, 196 N. C. 145.

Fountain Park Co. vs. Hensler (Ind.), 155 N. E. 465, 50 A. L. R. 1518.

Detroit R. R. Co. vs. Fuller, 205 Fed. 86.

Nashville, etc., R. R. Co. vs. Taylor, 86 Fed. 168.

Vicksburg vs. Mulane, 106 Miss. 199, 63 So. 412.

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

Hyland, Sheriff, vs. Sharp, 41 So. 264, 88 Miss. 567. 12 C. J. 1152.

State vs. Banner Cleaners & Dyers, Inc., 127 So. 370, 170 La._____.

Southern Ry. Co. vs. Green, 216 U. S. 400, 30 Sup. Ct. 287.

In determining whether a state taxing law contravenes rights secured by the Federal Constitution the decision must depend "not upon any mere questions of form, construction or definition, but upon the practical operation and effect of the tax imposed".

Cooley, Law of Taxation, 4th. Ed., Vol. I, page 313.

Schaeffer vs. Carter, 252 U. S. 37, 64 L. Ed. 445, 40 Sup. Ct. Rep. 221.

The Practical Operation and Effect of the Tax in This Case.

The practical operation and effect of the amendment of 1926 is to exempt the Columbus & Greenville Railway Company from its proper proportion of the tax, and to impose an arbitrary and unreasonable proportion upon the

Yazoo & Mississippi Valley Railroad Company, and favors a Mississippi corporation located wholly within the state over a foreign corporation located partly within and partly without the state. It amounts to an abritrary and oppressive discrimination between two similar species of property and between two persons of the same class and situation.

The classification in the case at bar is based solely upon a mileage basis. The value of the railroad property, the business done, the gross earnings, the direction of the railroad, its closeness to the river, or even the number of years in operation are not taken into consideration. Were this a statute dealing with the rates, there would be a slender chance of same being upheld. But as heretofore stated, the tax must be based upon the benefits accruing to the taxpayer or its property by virtue of the erection and maintenance of said levees.

What is the effect of the classification in this case?

All main line railroads over twenty-five miles in length pay $350.00 per mile, and all main line railroads under twenty-five miles pay $50.00 per mile. On the other hand, a narrow gauge railroad, without respect to the number of miles, pays $87.50 per mile, and a branch line, with out respect to the length thereof, pays $210.00 per mile, a classification so unreasonable that the Honorable Chief Justice of the Mississippi Supreme Court said that the citation of authorities was unnecessary to support an opinion declaring the same unconstitutional.

Counsel for petitioner continually called the tax a graduated tax. This is incorrect, as the tax is not a graduated one. To be classified as a graduate tax, it should have

provided that a railroad shall pay $50.00 on the first twenty-five miles and $350.00 on each mile in excess thereof. But in its zeal to favor the intrastate road, the legislature has required the Yazoo & Mississippi Valley Railroad Company to pay the large sum of $350.00 on its first mile and on each and every mile.

Under this classification a main line railroad twenty-six miles in length pays $8100.00 and a main line railroad twenty-four miles in length pays only $1200.00. The petitioner operates eighteen miles in the district and is the only railroad operating less than twenty-five miles in the district.

Counsel for petitioner, at page 22 of the brief, have attempted to classify the railroads under the statute. In making this classification, counsel makes a mistake that changes the entire complex of the case at bar. Counsel states that the special tax of $50.00 on railroads applies to all railroads, main line, narrow gauge and branch lines, less than twenty-five miles in length. This classification is incorrect, as the proviso *applies only to main lines*, being placed in the law, as admitted by counsel for petitioner, for the sole benefit of petitioner. We must therefore strike out the phrase in classes 2 and 3 given by counsel of "less than twenty-five miles." The effect of the correct classification is as follows:

Class 1. A main or trunk line standard gauge railroad, exclusive of side tracks and switches, pays on each and every mile, $350.00, or if twenty-five miles long, it pays $8100.00.

Class 2. A narrow gauge railroad, less than standard, exclusive of side tracks and switches, pays on each and every mile, $87.50, or for eighteen miles, $1575.00.

Class 3. Upon each feeder or branch of a main line or trunk line, $210.00 on each and every mile, or for eighteen miles, $3780.00.

Class 4. Main line railroad operating not in excess of twenty-five miles in the district pays $50.00 on each and every mile, or for eighten miles, $900.00.

The petitioner operates eighteen miles in the district, and is the only railroad in Class 4.

The photostatic map of railroad mileage in the record shows the Columbus & Greenville Railroad Company runs from Greenville through Leland, *or east and west*, a distance of 18.41 miles.

The Yazoo & Mississippi Valley Railroad Company, the other main line in the district, has two branches therein, one running from Rosedale to Cleveland, *east and west*, a distance of 28.21 miles, and one from Kelso to Holly Bluff, *east and west*, a distance of 15.99 miles.

Yet the Yazoo & Mississippi Valley Railroad Company pays $210.00 per mile on said *branch* lines and the Columbus & Greenville Railway Company pays only $50.00 on its *main* line. The gross inequality of the act is seen by the fact that on the branch from Kelso to Holly Bluff, which is shorter by three miles and runs in the same direction, the Yazoo & Mississippi Valley Railroad Company pays four

times as much tax as the gross tax of the Columbus & Greenville Railway Company. The main line of the Columbus & Greenville Railway Company is much closer to the break of 1927 and suffered greater damage from said flood.

Even a lumber company operating a narrow gauge railroad running from its mill to its lumber tract pays a greater tax per mile on said road than the petitioner.

Let us view this tax from the viewpoint of the other forms of taxation in the district.

There is levied an acreage tax of two cents per acre on land in the district. Suppose the tax was changed so as to read that a tax of one cent per acre is levied on all farms of twenty-five acres or less, and a tax of four cents per acre is levied on all farms of over twenty-five acres. Being a benefit tax, could same possibly be upheld? We think not. A tax of one dollar per bale is levied on all lint cotton raised and gathered in the district. Were the tax changed to provide that a tax of fifty cents per bale must be paid by all farmers raising one hundred bales of cotton or less, and a tax of two dollars per bale paid by all farmers raising more than one hundred bales, could same possibly be held constitutional? We think not. The benefit to each and every acre of land in the district and the corresponding benefit to each and every bale of cotton from the protection afforded by the levees is the same. The benefit to each and every mile of main line or standard gauge railroad in the district is identically the same.

> "It must appear not only that a classification has been made, but also that it is one based upon

> some reasonable grounds—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection, and there can be no discrimination between subjects which properly belong to the same class. The right of classification is allowed in order to avoid or correct inequalities, never to create them." 26 R. C. L., Taxation, Sec. 216 and authorities above cited.

The effect and operation of the tax herein levied is to impose a gigantic tax in the aggregate on the Yazoo & Mississippi Valley Railroad Company, and on the other hand, to require the petitioner, Columbus & Greenville Railway Company, to pay only a nominal tax in proportion. This tax certainly bears no reasonable relationship to the purpose of the tax, which, as heretofore stated, is based solely upon the benefits of levee protection.

Examples of Unconstitutional Classifications.

As stated in the opinion of the Court:

> "The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory."

We shall, however, discuss a few authorities in support of our contention.

Cotting vs. Godard, 183 U. S. 49, 46 L. ed. 92.

The State of Kansas enacted a law regulating rates for stockyards in the state and providing that said law should apply only to those receiving over one hundred head of cattle per day. This Court, speaking through Mr. Justice Brewer, held the same unconstitutional, and we quote from the opinion:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the right of classification of industries and occupations, we must nevertheless always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other. There can be no pretense that a stock yard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra 2 head of cattle per day does not change the character of the business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guaranty of the equal protection of the laws is lost, and the door is opened to that inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply leg-

islation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but it is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would. We think, therefore, that the principle of the decision of the supreme Court of Kansas in *State v. Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340, is not only sound, but is controlling in this case, and that the statute must be held unconstitutional as in conflict with the equal protection clause of the 14th Amendment."

Louisville Gas & Electric Co. vs. Coleman, 277 U. S. 32, 48 Sup. Ct. Rep. 423, 72 L. ed. 770.

A Kentucky statute taxing the recording of mortgages running more than five years and exempting from the tax those which matured within five years or less was held to violate the equal protection clause of the Federal Constitution as arbitrary classification:

"Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or

just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be invoked as the sole basis for a like classification in respect to such property. Certainly one who is secured by the state in the priority of his lien for a period less than five years enjoys a privilege which in kind and character fairly cannot be distinguished from one who enjoys a like privilege for a longer period of time. The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons, neither safely can forego, a tax from the latter not imposed in any degree upon the former, produces an obvious and gross inequality. If the state, upon the same classification, had reversed the process and taxed indebtedness maturing within a shorter period than five years, and exempted such as matured in a longer period, the inequality probably would be readily conceded, but the constitutional infirmity, though more strikingly apparent, would have been the same."

People ex rel Farrington vs. Mensching, 187 N. Y. 8 10 Ann. Cas. 101:

A New York statute taxing stock certificates was involved in this case, and we quote the following clear-cut illustration from the opinion:

"Even if a tax on farms according to acreage might be sustained, it is obvious that a tax on farms according to the number of fields into which they are divided would not be valid. Such a classi-

fication would not treat all in the same class alike, and would impose a heavier burden upon one farm than upon another of the same size, situation, and value. A statute imposing such a tax would not give 'that equal protection and security' to which all, under like circumstances, are entitled 'in the enjoyment of their personal and civil rights.' *Barbier vs. Connolly*, 115 U. S. 27, 5 U. S. Sup. Ct. Rep. 357; *Matter of Jacobs*, 98 N. Y. 98; *People* vs. Marx, 99 N. Y. 377, 2 N. E. Rep. 29."

Fiscal Court of Owen County vs. F. & A. Cox Company, 117 S. W. 269, 21 L. R. A. (N. S.) 83:

The Kentucky statute placed a tax of seventy-five dollars on each three horse wagon operated for business, and a tax of two hundred dollars on each four horse wagon operated for business. The tax, being such an arbitrary discrimination and distinction, was held void.

"Furthermore, the order itself shows that the owner of a four-horse wagon is required to pay three times as much tax as the man who operates a three-horse wagon, when there is nothing in the character of the wagons to justify such inequality. It may be conceded that a reasonable classification for the purpose of license taxes may always be made. Classification based upon the character of the vehicles and the number of horses used in connection with them may be proper (*Smith v. Louisville*, 9 Ky. L. Rep. 779, 6 S. W. 911), but the classification sought to be made in this case is manifestly unequal and unreasonable. It cannot be said to be reasonable because it bears alike upon all owners of four-horse wagons. The class of persons whose occupations are taxed are

those who run and operate vehicles for hire. The taxing power may subdivide this class, but it cannot unjustly discriminate between the subdivisions so made. As the order in question unjustly discriminates between the owners of three-horse vehicles and the owners of four-horse wagons, it follows that the license fee of $200, imposed upon four-horse wagons, is therefore void. *Livingston v. Paducah*, 80 Ky. 656; 1, *Dill. Mun Corp.* 323; *Simrall v. Cavington*, 90 Ky. 444, 9 L. R. A. 556, 29 Am. St. Rep. 398, 14 S. W. 369; *Cooley, Tax.* 127; *Hager v. Walker*, supra."

Fountain Park Company v. George Hensler, et al (Ind), 155 N. E. 465, 50 A. L. R. 1518.

"In the case at bar all chautauqua companies, which, as such, possess common attributes and stand in like situation with relation to any public necessity that might exist for their obtaining a site, are split up, and a subclass—a very small subclass of such companies, to-wit, those which have existed and conducted meetings for sixteen days a year continuously for fifteen years, and which have held a lease for all of said period on a tract of timberland—has been singled out as the recipient of the benefits conferred by the statute.

* * * * * * * *

"We can see no necessity for, nor propriety of, different legislation for a chautauqua company that has operated sixteen days a year for fifteen years, than for one which has operated fourteen days a year for five years; for a chautauqua company that has operated on a leased track of woodland for fifteen years, than for one which operates in a city park or in a school yard or which

owns a piece of prairie land. Such differences are not germane to the purpose of the law, which is to grant the right of eminent domain to chautauqua companies. Leases and timberlands are merely property incidents and are not reasonable or natural differences upon which to base the legislative classification. The attempted classification does not embrace all those possessing the common attributes of the appellant company, and we believe it is capricious and arbitrary, can serve only to identify and not to classify, and that the act therefore is invalid."

A. & P. Tea Company v. Doughton, 144 S. E. 701, 196 N. C. 145.

A statute imposing a license tax for revenue purposes on each store of chain store establishment having over six stores was held in this case to violate the equal protection clause of the Constitution.

The Mississippi Supreme Court, in the case of *Adams vs. Standard Oil Company*, 97 Miss. 879, 53 So. 692, laid down the following general principle as to classification:

"What are the limits of the power of classification by the states under this constitutional provision? It is undoubted that the power of the states to make classification of persons and property for the purpose of taxation, as well as for other purposes, is broad; but it is equally true that the mere fact of classification is not sufficient to relieve a statute from the operation of the equality clause. The classification must be based on some reasonable ground, and some real difference which

> bears a just and proper relation to the object sought to be accomplished. 'Mere arbitrary selection can never be justified by calling it classification,' and discriminations against persons and classes of an unusual character are obnoxious to the Constitution. 4 Encyc. U. S. Sup. Ct. Rep. 362, 363:"

Hyland, Sheriff, vs. Sharp, 88 Miss. 567, 41 So. 264.

The court had under review a privilege tax on those doing a money lending business on personal security, such as household furniture, wearing apparel, etc., and the amount of the tax was based on the kind of security. The tax was declared unconstitutional by the Mississippi Supreme Court as being class legislation and on the ground that,

> "All in the class are not dealt with alike * * * * * The tax in this case is not imposed on all money lenders, graduating the tax according to the population of the town or the amount of the loans, etc. It attempts, arbitrarily, to base the tax upon the kinds of securities. * * * * A law depriving the citizen of his property without due process of law."

We could quote and cite a long line of authorities similar to those herein cited. We have attempted to pick out a few decisions which we think support the decision of the Mississippi Supreme Court.

Judgment Based Upon Act of 1926. Same Statute May Be Constitutional in Part and Unconstitutional in Part.

The inconsistency of the petitioner's position in this case is glaring. Petitioner comes here by petition for writ of certiorari for the purpose of sustaining the validity of Section 1, Chapter 259, Laws of 1926. In the same case, petitioner has prosecuted a direct appeal for the purpose of having Section 1, Chapter 282, Laws of 1914, declared unconstitutional. Yet, as heretofore stated (page 6) the law of 1926 is identical with the law of 1914, except for the proviso which exempts from its provisions a railroad whose main line is less than twenty-five miles in length in the district from the $350.00 tax per mile and places a special tax of $50.00 per mile thereon.

How counsel can maintain that the classification contained in the Act of 1914 is unconstitutional and at the same time maintain that the classification in the Act of 1926 is constitutional is beyond our understanding.

We again call the Court's attention to another inaccurate statement contained in the brief for petitioner (paragraph 2, page 10, paragraph 4, page 17, and page 20) wherein it is asserted that the Supreme Court of the State of Mississippi declared the entire Act of 1926 null and void and reinstated the Act of 1914. With the proviso complained of stricken out, the Act of 1926, as hereinbefore stated, became and was in fact the Act of 1914, and the Mississippi Supreme Court therefore held.

"* * * * It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellant will have to pay will be the same; that is, $350.00 per annum on each mile of its railroad in the levee district.

"For, if the statute should be held void, chapter 282, Laws of 1914, would remain in full force and effect, under which the complaining railroad's tax would be $350 per mile, the exact amount imposed by chapter 259, Laws of 1926; or, if the proviso only of chapter 259, Laws of 1926, is void, the same result would follow."

It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that part which is unconstitutional may be stricken out and rejected and the valid part of the statute retained.

6 R. C. L. 121.

Allen vs. Louisiana, 103 U. S. 80, 26 L. ed. 318.

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

Ballard vs. Miss. Cotton Oil Co., 81 Miss. 507, 34 So. 533, 95 A. S. R. 476.

6 R. C. L. 121.

"It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest the portion which is constitutional may stand while that which is un-

constitutional is stricken out and rejected; but where it is not possible to separate that which is unconstitutional from the rest of the act, then the whole statute falls. If after eliminating the invalid portions, the remaining provisions are sufficient to be operative and accomplish their proper purpose, it does not necessarily follow that the whole act is void. The constitutional and unconstitutional parts should be severable so that the valid portion may be read and may stand by itself. In determining the question whether the parts of a statute are severable within the meaning of this principle, the court acts by inspection of the statute. The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable, so that some stand while others fall." 6 R. C. L. 121.

Allen vs. Louisiana, 103 U. S. 80.

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.

* * * * * * *

Adams vs. Standard Oil Co., 97 Miss. 879, 53 So. 692.

"In treating this question, Judge Cooley, in his work on Constitutional Limitations (7th Ed.) pp. 246, 247, 248, says: 'Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be

presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance.' If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained."

SUMMARY.

The petition and brief of the petitioner, Columbus & Greenville Railway Company, fails to substantiate the contentions of the petitioner that the decision of the Supreme Court of Mississippi is erroneous. The opinion is supported by a long line of well reasoned cases from this Court and from the Mississippi Supreme Court.

The decision of the state court holding that the Act of 1926, insofar as the same discrimniated between main line railroads less than twenty-five miles in length in the levee district, and main line railroads in excess of twenty-five miles, violated the 14th Amendment to the Constitution of the United States, and the "due process" and the "uniformity and equality" clauses of the Mississippi Constitution. The tax being levied and assessed solely for the purpose of building, repairing and maintaining levees and for

protection from overflow, the provision of the law favoring in its intent and purpose the domestic railroad located wholly within the state is unreasonable and arbitrary, and bears no relationship to the purpose of the tax, and is a palpable, whimsical and arbitrary discrimination between two similar species of property and between two persons of the same class in the same situation.

We respectfully submit that there is no probable error in this cause and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Section 112, Mississippi Constitution 1890.

"Taxation shall be uniform and equal throughout the state. Property shall be taxed in proportion to its value. The legislature may, however, impose a tax per capita upon such domestic animals as from their nature and habits are destructive of other property. Property shall be assessed for taxes under general laws, and by uniform rules, according to its value. But the legislature may provide for a

special mode of valuation and assessment for railroads, and railroad and other corporate property, or for particular species of property belonging to persons, corporations, or associations not situated wholly in one county. But all such property shall be assessed at its true value, and no county shall be denied the right to levy county and special taxes upon such assessment as in other cases of property situated and assessed in the county.

Section 234, Article 11, Levees, Mississippi Constitution 1890.

"No bill changing the boundaries of the district, or affecting the taxation or revenue of the Yazoo Mississippi Delta Levee District, or the Mississippi Levee District, shall be considered by the legislature unless said bill shall have been published in some newspaper in the county in which is situated the domicile of the board of levee commissioners of the levee district to be affected thereby, for four weeks prior to the introduction thereof in the legislature; and no such bill shall be considerd for final passage by either the senate or house of representatives, unless the same shall have been referred to, and reported on, by an appropriate committee of each house in which the same may be pending; and no such committee shall consider or report on any such bill unless publication thereof shall have been made as aforesaid.